

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

MONTEREY MUSHROOM, INC.,)	
)	
Employer,)	Case No. 78-RC-3-M
)	
and)	5 ALRB No. 2
)	
UNITED FARM WORKERS OF)	
AMERICA, AFL-CIO,)	
)	
Petitioner.)	

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

A secret ballot election was conducted on March 8, 1978, among the agricultural employees of Monterey Mushroom, Inc. (Employer), in the state of California following a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW), on March 1, 1978. The official tally of ballots showed the following results :

UFW.....	138
No Union.....	42
Challenged Ballots.....	<u>11</u>
Total.....	191

The challenged ballots are not sufficient in number to affect the results of the election.

On June 28, 1978, after a hearing held on May 24 and 25, 1978, Investigative Hearing Examiner (IHE) Elizabeth Miller

issued her decision in which she recommended that the Employer's objections to the conduct of the election be dismissed and that the UFW be certified as the collective bargaining representative of the employees of the Employer. The Employer filed timely exceptions^{1/} to the IHE's Decision and a brief in support thereof. The UFW filed a brief in opposition to the Employer's exceptions.

The Board has considered the objections, the record, and the IHE's Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings and conclusions of the IHE and to adopt her recommendations to dismiss the objections and to certify the UFW.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes have been cast for the United Farm Workers of America, AFL-CIO, and that pursuant to Labor Code Section 1156 the said labor organization is the exclusive representative of all agricultural employees of Monterey Mushroom, Inc., for purposes of collective bargaining, as defined in Labor Code

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^{1/}The Employer objects to the presence of a Regional Office representative at the hearing. The Board is entrusted with the duty of insuring the proper conduct of the election process under Labor Code Section 1156(c). We consider the presence of a Regional Office representative at an investigative, non-adversary hearing to be both helpful and proper in developing a full and complete record, as a basis for resolving all election and post-election issues.

Section 1155.2(a), concerning employees' wages, working hours and other terms and conditions of employment.

DATED: January 9, 1979

GERALD A. BROWN, Chairman

ROBERT B. HUTCHINSON, Member

JOHN P. McCARTHY, Member

CASE SUMMARY

Monterey Mushroom, Inc.

Case No. 78-RC-3-M

5 ALRB No. 2

IHE DECISION

After an election won by the UFW, a hearing was held on three of the Employer's objections: (1) whether a Board Agent told an employee to vote for the UFW; (2) whether a Board Agent threatened employees with physical harm and verbally abused them on the Employer's property; and (3) whether Board Agents attended UFW organizational meetings. The IHE found, based on her resolution of credibility, that a Board Agent did not tell an employee to vote for the UFW. She also found that another Board Agent's statements and questions of an employee concerning problems with his Employer were proper and did not exhibit bias against the Employer, and that the Board Agent's presence at the union meeting hall on unrelated business at time a union organizational meeting was being conducted is not conduct which warrants setting aside the election absent a showing that the agents aligned themselves with the union.

BOARD DECISION

The Board affirmed the IHE's Decision and Recommendation to certify the union. It also pointed out that it was proper and helpful for a representative of the Regional Office to attend the investigative hearing.

Objections dismissed. Election upheld. Certification granted.

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This Case Summary is furnished for information only and is not an official statement of the case, or of the ALRB.

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

MONTEREY MUSHROOMS, INC.,

Employer,

Case No. 78-RC-3-M

and

UNITED FARM WORKERS OF
AMERICA, AFL-CIO,

Petitioner.

Jordan Bloom and John T. Hayden,
Littler, Mendelson, Fastiff & Tichy,
for the employer.

Linton Joaquin, for the United Farm
Workers of America, AFL-CIO.

DECISION

STATEMENT OF THE CASE

ELIZABETH MILLER, Investigative Hearing Examiner: This case was heard in Watsonville, California, on May 24 and 25, 1978. On March 1, 1978, the United Farm Workers of America, AFL-CIO (UFW) filed a Petition for Certification. A representation election was held on March 8, 1978, among all the agricultural employees of Monterey Mushrooms, Inc. (employer) in California. The result was:

UFW	138
No Union	42
Unresolved Challenged Ballots	11
Total	191

The employer timely objected to the election, alleging a variety of misconduct as grounds for setting aside the election. Pursuant to his authority under 8 Cal. Admin. Code §20365(c), the executive secretary dismissed some of the objections and set others for hearing. The employer's Request for Review of several of the dismissed objections was denied. The following objections were set for hearing:

1. Board agents told employees to vote for the UFW because the UFW would protect illegal aliens from the U.S. Immigration authorities;

2. Board agents threatened employees with physical harm and subjected employees to verbal abuse on the employer's premises in front of other employees; and

3. Board agents attended UFW organizational meetings.

The employer and the UFW were represented at the hearing and were given full opportunity to participate in the hearing, including examining witnesses and filing briefs. ^{1/} Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the arguments made by the parties, I make the following findings of fact and conclusions of law.

^{1/}The Board has an independent interest in ascertaining the truth of the allegations, since all concern conduct by its agents. I therefore requested those agents whose conduct was in question to attend the hearing. I also permitted Francis Fernandez, a Board attorney, to be present to aid the Board in its investigation by representing the Board agents and by eliciting the facts. Fernandez was allowed to be present to examine witnesses and to voice objections. The Board was not made a party to the proceeding. The hearing examiner's powers to conduct these investigatory hearings, 8 Cal. Admin. Code §20370(b), include the implied power to permit participation by Board attorneys which will aid the investigation. The NLRB follows a similar practice. NLRB Casehandling Manual, Part II, §11424.4.

FINDINGS OF FACT

1. Objection that Board agents told employees to vote for the UFW because the UFW would protect illegal aliens from the U.S. Immigration authorities.

In support of this objection, employee Roberto Zuniga testified on direct examination that while he and Board agent Maria Leslie were alone, she told him that the union would help the workers, even those who were undocumented, by placing a watchman so that the Immigration and Naturalization Service (INS) would not take the workers away. Zuniga also testified that Leslie told him to vote for the union.

Zuniga contradicted his earlier testimony when he was asked on cross examination about the statement concerning the INS. When asked if Leslie had said that it was the State which would provide the watchman, Zuniga replied that she told him "someone" would place a watchman. When questioned further, Zuniga admitted that Leslie had not told him who would place the watchman.

While Board agent Leslie did not remember the specific conversation with Zuniga, she testified that she generally told employees, when asked about whether INS officials might come to elections, that the election was for all workers, even those who are undocumented, and that the INS had agreed with the Board that it would not "bust" companies during election campaigns. Leslie also testified that she has never told employees to vote for the union. Rather, she generally tells them that they can vote for or against the union. Two employee witnesses corroborated Leslie's testimony.

I find that Leslie did not make the statements as reported by Zuniga. Because of Zuniga's demeanor, and self-contradiction

regarding the INS statement, I do not credit his rendition of the conversation. It is very unlikely that Leslie would divert from her usual statements to tell one employee whom she did not know to vote for the union. The employer also did not produce sufficient evidence to show that Leslie was biased in favor of the UFW, and it is reasonable to assume that even if a Board agent were to undertake such a partisan position she would indicate that position to more than one employee. There was no evidence that Leslie ever made statements favoring' the UFW to any other employee.

2. Objection that Board agents threatened employees with physical harm and subjected employees to verbal abuse on the employer's premises in front of other employees.

3. The employer's evidence in support of this objection consisted of the testimony of Pedro Gomez, an employee, concerning a conversation between a Board agent, apparently Albert Medrano, and a group of employees on the day before the election. In the course of informing the workers about the election, and describing their rights under the Act, Medrano approached a small group of employees. He asked if they had any problems with the company or the supervisors, and one man responded that they had no problems. Medrano then asked how it was that they had no problems. ^{2/} Gomez testified that when Medrano made the second comment, he was "somewhat agitated" and Gomez felt "a little threatened," but "not very much." The statement was not made in a loud tone of voice.

^{2/} Medrano denied asking employees about their problems, but it is unnecessary to make a credibility resolution since, the statements, even as reported by Gomez, are insufficient to require overturning the election.

3. Objection that Board agents attended UFW organizational meetings.

An organizational meeting was held for Monterey Mushroom employees sometime during the latter half of February at the UFW hall in Watsonville. During the evening, while Monterey Mushroom employees were present, three agents of the Board entered the hall for the purpose of investigating an unfair labor practice charge involving a different employer. Maurice Jourdane and Ladislao Pineda were there to interview prospective witnesses. Maria Leslie came separately to pick up a document from Lisa Feldberg, the office administrator.

The formal meeting was not being conducted when the Board agents were present, but there was a crowd of people in the hall, mostly employees of the employer. Jourdane and Leslie testified that they saw no formal meeting, and Roger Belgard, an employer witness, testified that people were "mingling." Only Larry Howell testified that the meeting was in progress, but he described the Board agents as going into a "crowd" of people when he saw them.

Belgard and Howell testified that both Jourdane and Leslie spoke briefly with individuals in the hall. The only evidence of the content of such conversations was from Leslie, who testified that she said no more than "hello" or "excuse me" to people she passed. It is unclear whether Jourdane actually interviewed anyone on that night, but the testimony showed that all interviews he conducted took place in a separate office.

None of the Board agents was introduced to the group, or took any part in the meeting. While Feldberg, Belgard and Howell were in a separate office, Feldberg did point Jourdane out to them and told them that he had won a case abolishing the short-handled hoe.

While the employer asserts that Felberg described Jourdane as having "pioneered previous UFW-backed causes," there was no credible evidence that Feldberg linked Jourdane's legal work with the UFW. Jourdane testified that he was working for a different employer when he handled that case.

CONCLUSIONS OF LAW

The NLRB has employed two different standards in determining whether to set an election aside because of misconduct by Board agents. In some cases, the Board has looked to the effect of such conduct on the outcome of the election. In other cases, the Board has considered the possible detrimental effect of the agent's misconduct upon the integrity of the Board's election processes, regardless of the outcome. Williams, Janus and Huhn, NLRB Regulation of Election Conduct, pp. 360-361.

NLRB elections have been upheld where Board agents committed acts of fraternization or made statements which could be interpreted as favoring one side, but there was no effect on the election. See, e.g., NLRB v. Dobbs Houses, Inc., 435 F.2d 704 (5th Cir. 1970)[76 LRRM 2120]; Wald Sound, Inc., 203 NLRB 366 (1973) [83 LRRM 1125]; Wabash Transformer Corp., 205 NLRB 148 (1973) [83 LRRM 1545]. On the other hand, the NLRB has stated that it may set aside an election where commission of an act tends to destroy confidence in the Board's election processes, or could reasonably be interpreted as impugning the election standards, even if the voting is not affected. See, Athbro Precision Engineering Corp., 166 NLRB 966 (1967) [65 LRRM 1699].

The ALRB has held that it will not set aside an election based upon bias or an appearance of bias unless it affected the conduct of the election and impaired the balloting's validity as a

measure of employee choice. Coachella Growers/ Inc., 2 ALRB No. 17 (1976). This more "pragmatic" approach^{3/} is appropriate in the agricultural context, where a new election generally could not be run until the next peak of employment, which may be a year away. See, D'Arrigo Bros. of California, 3 ALRB No. 37 (1977), p. 4.

It is my finding that Board agent Leslie did not tell employee Zuniga that the UFW would prevent the INS from coming to the election, or that he should vote for the union. Even if she had made these statements, they would have been highly improper but insufficient to set aside the election because there could have been no effect on the election. Leslie and Zuniga were alone when they spoke, and there is no evidence that any employee overheard or was informed of the conversation. ^{4/} The NLRB has refused to set aside elections where Board agents told employees they could "now vote for your union representative," Wabash Transformer Corp., supra, or even when Board agents explicitly expressed their personal feelings about the opponents in the election. NLRB v. Dobbs Houses, Inc., supra (Board agent told an election observer that the union would win and that would do people a lot of good).

When Albert Medrano spoke with the employees about any problems they might have with the employer, his questions did not constitute threats. While Medrano may have been somewhat rude or

^{3/} Williams, Janus and Huhn, supra, at p. 361.

^{4/} The employer argues that the statement about the INS carries an implied threat of deportation. I find it unreasonable that an employee would interpret the alleged statement as such a threat.

abrupt, Gomez' description of the conversation shows that there was no threat, and no possible effect on the election. When asked if Medrano had been angry, or had spoken in a loud tone of voice, Gomez testified that he appeared "somewhat agitated" and spoke in a "medium" tone of voice. When asked if he actually felt threatened, Gomez responded, "not very much."

Medrano's questions also did not show bias against the employer. They simply constituted questioning related to employee rights, which should not be presumed as arising from improper motives. Arnold Stone Company of N.C., Inc., 102 NLRB 1012 (1953) [31 LRRM 1383]. While Board agents should make explicit that they are concerned not only with employees' problems with their employer but also with the union, the questions were not sufficiently prejudicial to set aside the election. See, Wabash Transformer Corp., *supra*.

I have found that the Board agents who attended the UFW hall were not present during the organizational meeting. But even if they had been, their presence would have been insufficient to set aside an election, so long as they conducted themselves in such a way as not to align themselves with a particular party. Coachella Growers, Inc., 2 ALRB No. 17 (1976) . No evidence was presented to show that when Jourdane, Pineda and Leslie visited the union hall they aligned themselves with the UFW. Their presence was in connection with the investigation of an unrelated unfair labor practice charge, and there was no evidence that any of them stayed in the meeting hall more than a few minutes, or exchanged more than pleasantries with people in the hall.

Only one case has been brought to my attention in which an NLRB election was set aside because of a Board agent's participation

in a union organization meeting, and in that case the conduct by ALRB agents here was specifically condoned. See, Provincial House, Inc. v. NLRB, 568 F.2d 8 (6th Cir. 1977). In Provincial House, a Board agent attended a union organizational meeting for the purpose of investigating an unfair labor practice charge. (In that case, the charge was against the employer whose employees were attending the meeting.) The court stated that such visits to organizing meetings are permissible, so long as the Board agent does not become "a part of" the meeting. Ibid., at 11. The Board agent overstepped that boundary "precisely" when he allowed himself to be introduced to the union meeting. The Board agents here were not introduced to the meeting, and did not become a part of the meeting in any way. Their presence at the union hall is insufficient to set aside the election.

CONCLUSION

The employer contends that this election overturned because of alleged improprieties by Board agents. However, the evidence shows only that one Board agent asked employees about their problems in a "somewhat agitated" tone of voice, and that three Board agents attended a union hall to investigate unrelated unfair labor practice charges on the night of an organizing meeting. While Board agents should attempt to separate their investigative functions from union organizing, the mere presence of Board agents at an organizing meeting is insufficient to set aside an election. Similarly, while Board agents should treat employees with impartiality and respect, insignificant instances of rudeness or abruptness are insufficient to set aside an election.

RECOMMENDATION

Based on the findings of fact, analysis and conclusions herein, I recommend that the employer's objections be dismissed and the United Farm Workers of America, AFL-CIO, be certified as exclusive bargaining representative of all the agricultural employees of the employer in the State of California.

DATED: June 28, 1978

Respectfully submitted,

Elizabeth Miller

ELIZABETH MILLER
Investigative Hearing Examiner